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ALEXANDER L. STEVAS,
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No. 82-735

IN THE

Supreme Court of the United States

October Term, 1982

GOLDEN STATE TRANSIT CORPORATION, dba YELLOW CAB OF LOS ANGELES,

Petitioner,

vs.

CITY OF LOS ANGELES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

The respondent, City of Los Angeles, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in the case. The opinion is reported in 686 F.2d 758.

Statement of the Case.

The City generally accepts the petitioner's statement of the case with several qualifications and additions. Initially, obviously, the City does not agree that the Court of Appeals' opinion vacating the injunction was and is in error. Rather it was the correct decision.

Yellow Cab's taxicab franchise expired by its own terms on March 30, 1981. Yellow Cab originally had a franchise which provided, in part,

> "This franchise shall expire October 29, 1980, unless sooner terminated . . ." (Excerpt of the Record, 95).

The franchise had no provision for a renewal or extension of the franchise. The City did eventually pass a subsequent franchise ordinance granting Yellow Cab a franchise which by its terms expired March 31, 1981. (ER 102). There was in this franchise the same terms and conditions as in the previous franchise and consequently there was no provision for renewal or extension.

Yellow Cab states, on pages 6 and 7 of its petition, that the City, through its Charter, was required to have adopted an ordinance of general application establishing the procedural standards for granting the renewal of franchises and that there are no established procedural standards for renewal of taxicab franchises which Yellow Cab failed to meet. The City did adopt a procedural ordinance, as referred to in Docket No. 2 of the record, a copy of this ordinance was attached to Appellant's (City) reply brief in the Court of Appeals and judicial notice was requested of said ordinance. This ordinance indicates that the procedural ordinance adopted by the City relates to the administrative procedures the City follows in granting franchises. It does not establish any standards for renewal of franchises for the franchisee.

Yellow Cab's petition gives the impression, in the Statement of Facts, that as a result of the testimony of the Teamsters that the City Council "thereupon" denied Yellow Cab a franchise renewal. The City's action, in not granting the new franchise replacing the expiring one, was after a public hearing. At that hearing David Shapiro, the president of an association of independent taxi drivers testified, in part;

> "David Shapiro, President of the United Independent Taxi Drivers. I would like to say that with the demise of the Yellow and 350 less taxis in Los Angeles, (referring to Yellow Cab's then non-operations because of its driver's strike) I would like to inform the Council

that the drivers are now being served and are able for the first time in two and one-half years to make a decent minimal living. Secondly, the doormen of the major hotels report to me that they are having better quality service with the demise of the Yellow Cabs than they have ever had before." (ER 33).

During the course of the public hearing, on March 23, one of the City Councilmen, Zev Yaroslavsky, questioned Donald Howery, the General Manager of the City's Department of Transportation, the Department which regulates taxicabs in the City. Part of the questioning was as follows:

"Mr. Yaroslavsky. Thank you, Mr. President. Mr. Howery, could you tell me since the strike, how long has the strike been going on now? About a month?

Mr. Howery. Since February 11.

Mr. Yaroslavsky. And since that time have there been enough taxicabs on the streets to pick up the slack that has been left by their lack of presence?

Mr. Howery. We have not done a study of this, but we . . .

Mr. Yaroslavsky. What is your professional opinion?

Mr. Howery. We have not received complaints.

Mr. Yaroslavsky. Okay."

(ER 41).

Mr. Howery went on to testify that before the strike, "There were more than enough taxicabs on the street." (ER 42).

REASONS FOR DENYING THE WRIT.

1. The Court of Appeals' Decision Has Not Departed From the Accepted and Usual Course of Judicial Proceedings Regarding the Review of a Lower Court's Issuance of Injunctive Relief.

Petitioner argues that the court did not properly consider the issue as to whether there were "questions serious enough to require litigation" though the court had concluded the balance of harm tips decidedly toward the petitioner. The court stated (Page 2 of Appendix A):

> "We conclude that Yellow Cab has *little chance of making the requisite showing* that Congress intended to bar a city from refusing to renew the taxicab franchise of a company engaged in a collective bargaining dispute with its drivers. Thus, with respect to the preemption issue, Yellow Cab has failed to satisfy the 'serious question' requirement for issuance of a preliminary injunction.". (Emphasis added.)

Even under the "question serious enough to merit litigation" there has to be some chance of success. The Court, in *Benda v. Grand Lodge of International Ass'n of Machinists and Aerospace Workers*, 584 F.2d 308, 315(4) (9th Cir. 1978) stated:

> "No chance of success at all, however, will not suffice. The irreducible minimum has been described by one court as a fair chance of success on the merits, (cite) while another has said the question must be serious enough to require litigation (cite). The difference between the two formulations is insignificant. Therefore, we accept either as satisfactory."

As to the question of whether petition was denied due process the court specifically stated (Page 5 of Appendix A):

> "In sum, Yellow Cab has failed to raise a serious question with respect to the threshold issue in a procedural due process claim—whether the claimant has a constitutionally protected liberty or property interest."

As to the question of whether petitioner was denied due process the court stated (Page 7 of Appendix A):

> "We conclude that Yellow Cab has not met, and has little chance of meeting, its burden of establishing that no set of facts may reasonably be conceived to justify the classification." (Emphasis added.)

To say that is equivalent to saying that Yellow Cab does not have a fair chance of success on the merits. Thus a question serious enough to require litigation is not present. *Benda, supra.*

The appellate court did not depart from the appropriate standard for reviewing the granting of a preliminary injunction.

2. The Decision of the Court of Appeals Does Not Conflict With the Decisions of This Court Regarding the Congressional Prohibition Against a Local Government's Interference With Labor Disputes.

Yellow Cab cites the case of *Lodge 76, International Ass'n of Machinists and Aerospace Workers v. First Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) for the proposition that state and local governments may not interfere with the free exercise of the collective bargaining process as established by Congress under the Federal Labor Statutes.

In the *Lodge 76* case the Federal National Labor Relations Board had ruled that the particular action of a union, namely the concerted refusal to work overtime was not an unfair labor practice. The employer then filed an unfair labor prac-

tice complaint with the Wisconsin Employment Relations Commission, which proceeded to issue a cease and desist order against the union. The court ruled that the state action was improper. It was obvious, however, in that case that the state agency was taking an action directly contrary to the federal agency. In order to avoid a violation of the supremacy clause a state agency shall refrain from any such action.

In the present matter, Yellow Cab had asked the City to act. It asked the City to grant it a new franchise replacing the franchise due to expire. The logic of Yellow Cab's argument would lead to the City having to surrender all discretion when acting on a matter where there was a labor dispute involved. If such was the case all an applicant for a license, permit, or franchise from a governmental agency would need to do to assure its issuance is to be sure it was involved in a labor dispute at the time the governmental body acted on their application. Just because there may be a labor dispute does not mean that the City surrenders its discretion on a matter where it is being asked to exercise that discretion pursuant to its police power. The regulation of taxicabs is an exercise of the police power. *In Re Martinez*, 22 Cal.2d 259, 262(2); 138 P.2d 10 (1943). The California Supreme Court, in *Martinez*, pointed out that a City is empowered to regulate taxicabs pursuant to its police power granted by the State Constitution. The appellate court decision in the permit matter pointed out that the U.S. Supreme Court stated in the case of *Allen-Bradley, Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749; 62 S.Ct. 820; 86 L.Ed. 1154 (1942), that a state may still exercise "its historic powers over such traditional local matters as . . . the use of streets and highways."

The appellate court, in their opinion, stated that the district court finding that the effect of the denial of Yellow

Cab franchise renewal was to alter the balance of power in the collective bargaining dispute in favor of the Union was not clearly erroneous. This is not necessarily the case. The City, by not granting the renewal franchise was not benefiting the strikers since the nonrenewal would mean that they would no longer have a job, at least as drivers for Yellow Cab. This was pointed out in the discussion of the matter in the City Council before the Council action was taken. Councilman Ernani Bernardi, stated:

> "I don't know how having them (the drivers) stay out of work would be on their side, they are going to be out of a job. But, I think this really is a position we've got to taken and, would be to remain neutral." (ER 57).

Mr. Bernardi went on to say that he was going to "vote to remain neutral" and voted against Yellow Cab's request.

In conclusion there is distinction in the facts of the cases cited by petitioner and the facts in this case. In this case the City was not intruding but had been asked by Yellow Cab to act. Further the appellate court pointed out (Page 4, Appendix A) that Yellow Cab had not brought to the attention of the court nor had the court found any evidence that might raise to a "compelling congressional direction" to deprive a local government of the power to deny a franchise renewal to a franchisee involved in a labor dispute.

3. The Alleged Differential Treatment Between Petitioner and Other Applicants for a Renewal Franchise Has a Legitimate Governmental Purpose and Has Not Denied Petitioner Equal Protection of the Laws.

The City Council, the City's legislative body, first considered Yellow Cab's application for a renewal franchise on February 11, 1981, along with the application of the other companies. The granting of a franchise is a legislative

act. *Monarch Cablevision v. City Council*, 239 Cal.App.2d 206, 210(2b); 48 Cal.Rptr. 550 (1966). On that same date, February 11, Yellow Cab's drivers had gone on strike. (Finding of Fact, No. 7, Appendix B to the Petition.) Finding of Fact, No. 15, states that the City Council postponed consideration of Yellow Cab franchise until February 17. The same finding states that the City Council did proceed to grant new franchises to the other companies. Finding No. 16 states that on February 17, the City Council granted Yellow Cab a franchise extension only until April 30, 1981, provided that the City Council found before March 27, 1981, that the 30 day extension was "in the best interest" of the City. There was a legitimate governmental purpose in imposing this condition insofar as Yellow Cab was the only applicant for a renewal who was not providing taxicab service.

Finding No. 19 indicates that on March 23, 1981, the City Council met to consider whether it was in the "best interest" of the City to allow Yellow Cab a one-month extension of its franchise. A public hearing was conducted on that date. (ER 20-61). As indicated in the Statement of Facts Mr. David Shapiro, President of an Association of Independent Taxi Drivers, stated that with the non-operation of Yellow Cab drivers were able to make, for the first time, a decent minimal living and further stated that the doormen of the major hotels in the City had reported to him that they were getting a better quality of service. (ER 33-34). An exchange between Councilman Yaroslavsky and Don Howery, the General Manager of the City's Department of Transportation, indicated that there was adequate taxicab service without Yellow Cab. The appellate court decision, in this case, indicated that the differential between the applicants is valid if some legitimate state interest is advanced. The court further stated that the provision of quality taxicab

service and the assurance of adequate compensation for taxicab drivers could be a rational basis for such alleged differential treatment.

Yellow Cab further argues that the City was motivated by an impermissible purpose, namely to act in a labor dispute on behalf of the Teamsters. But the Court of Appeals, in their opinion, indicated that a reviewing court "will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive. *United States v. O'Brien*, 391 U.S. 367, 383 (1968)." And as stated there was a rational basis for the City's action.

4. The Alleged Differentiation Between Petitioner and Other Applicants Has Not Deprived Petitioner of Due Process.

The franchise under which Yellow Cab was operating had a specific date of expiration. The franchise did not provide for any renewal. The Los Angeles City Charter provides in part;

> "The City *may*, by ordinance . . . grant to the holder of such franchise a new franchise to replace such franchise about to expire". See Opinion of Court of Appeals, Petition, Appendix A, page 4. (Emphasis added.)

As to taxicab operations the California Court of Appeal has stated;

> "There is no vested or constitutional right to use a public street for conducting private business. (cite) A license or permit to engage in the taxicab business, issued by the city pursuant to it police power, does not convey a vested property right". *O'Connor v. Superior Court*, 90 Cal.App.3d 107, 114(4); 153 Cal.Rptr. 306 (1979).
>
> "The use of streets by taxicabs is a privilege that may be granted or withheld without violating either due

> process or equal protection. This privilege may be granted exclusively or nonexclusively to render public service." *Luxor Cab Co. v. Cahill*, 21 Cal.App.3d 551, 558(7); 98 Cal.Rptr. 576 (1971).

In the case of *Geriatrics, Inc. v. Harris*, 640 F.2d 262 (10th Cir. 1981) the district court had granted a preliminary injunction for the plaintiff nursing home against the Federal Department of Health, Education, and Welfare, and also against the Colorado State Department of Health from terminating medical funding of the nursing home prior to a hearing to ascertain whether or not the home had complied with Federal and State regulations. The Court of Appeals reversed stating:

> "A protectable property interest must be an interest secured by a statute or legal rule or through a mutually explicit understanding." p. 264(2).

The Court of Appeals, in its decision, determined that Yellow Cab did not have such an interest. Petition, Appendix A, page 5.

Yellow Cab makes reference to the case of *Hornsby v. Allen*, 326 F.2d 604 (5th Cir. 1964) wherein there was a denial of a liquor license to a party who had alleged that he had met all of the prescribed standards for the issuance of such a license. In that case, however, there were prescribed legislative standards, which, if met, entitled one to the issuance of the license. There were no such standards in this case which, if met, entitled one to a new franchise replacing an expiring taxicab franchise. The *Hornsby* court also pointed out that there was no suggestion that the sale of retail liquor in Georgia was "a public business which can be franchised by the State and treated as devoted to a public use. Page 609(9, 10). In the present matter, as has been stated, taxicab operations is a business devoted to a public use and is franchised by the City and is a "privilege"

which "may be granted exclusively or nonexclusively to render public service". *Luxor Cab Company v. Cahill, supra.*

Conclusion.

There is no serious question raised by the petition. The action involved here was the City's refusal to grant an applicant a new franchise replacing an expiring one. The City, within the discretion it had pursuant to its police power, was not obligated to grant this new franchise merely because the particular applicant was involved in a labor dispute. This case has its own particular set of facts distinguishable from those cases cited by petitioner, wherein a state or local entity gratuitously interjected itself into a labor dispute, acting when there was no need to act. Here the City was acting because the applicant had asked it to act on its application to the City for a new franchise.

The Court of Appeals recognizes that the use of streets and highways is a traditionally local matter left to state and local regulation under the police power and that the courts will not interfere with a legislative action if there is any set of facts which reasonably may be conceived to justify an alleged differential treatment. The decision further recognized that the petitioner in this matter did not have a constitutionally protected property interest. There was no serious questions with respect to the claims of violations of equal protection guarantees and procedural due process.

The Court of Appeals' decision in this case turns upon the particular facts involved and would appear to affect few

others than the litigants in this case. For the reasons stated above, the petition for writ of certiorari should be denied.

Dated: November 29, 1982.

Respectfully submitted,

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